Supreme Court, U.S
FILED

01 520 SEP 25 2001

No.
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In The

Supreme Court of the United States

R.W. DOCKS & SLIPS,

Petitioner,

v.

STATE OF WISCONSIN and WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Wisconsin

PETITION FOR WRIT OF CERTIORARI

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72 pp + 5/6

QUESTIONS PRESENTED

I.

Is the public trust doctrine a "background principle" of state property law as to always be a complete defense to a regulatory taking claim?

II.

Are individual condominium units to be regarded each as the relevant parcel in the "takings fraction," for purposes both of the categorical rule of *Lucas v. South Carolina Coastal Council* and the balancing test of *Penn Central Transportation Co. v. City of New York*?

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PETITION FOR WRIT OF CERTIORARI

R.W. Docks and Slips respectfully petitions for a writ of certiorari to review a decision of the Supreme Court of the State of Wisconsin.

OPINIONS AND JUDGMENT BELOW

The opinion of the Supreme Court of Wisconsin is reported as *R.W. Docks & Slips v. State*, 2001 WI 73, 244 Wis.2d 497, 628 N.W.2d 781 (2001). The opinion is reproduced and attached to this petition as Appendix pages 1-17. (App. 1-17)

The decision of the Wisconsin Court of Appeals is reported as *R.W. Docks & Slips v. State*, 2000 WI App. 183, 238 Wis.2d 182, 617 N.W.2d 519 (Ct. App. 2000); it is reproduced and attached as Appendix pages 18-24. (App. 18-24) The decision of the Bayfield County Circuit Court (Wisconsin) is unpublished. The Circuit Court Order and Judgment and a partial transcript of the Decision is reproduced and attached as Appendix pages 25-31. (App. 25-31)

JURISDICTION

The judgment of the Wisconsin Supreme Court was filed on June 28, 2001. (App. 1) That decision was a final judgment not subject to further review by any court save the Supreme Court of the United States. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part: "nor shall private property be taken for public use without just compensation."

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

Article IX, sec. 1 of the Wisconsin Constitution adopts verbatim the Northwest Ordinance of 1787 and provides: "The state shall have concurrent jurisdiction on all rivers and lakes bordering on this state so far as such rivers or lakes shall form a common boundary to the state and any other state or territory now or hereafter to be formed, and bounded by the same; and the river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the state as to the citizens of the United States, without any tax, impost or duty therefore." (This provision is commonly referred to as the *Public Trust Doctrine*.)

STATEMENT OF THE CASE

A. INTRODUCTION

The Petitioner, R.W. Docks & Slips ("R.W. Docks" or "Docks") is a general partnership in the business of developing recreational marinas. (App. 3) In 1969, R.W. Docks began the development of Port Superior Marina in

Bayfield, Wisconsin. The marina was designed to be a deep water sailboat harbor consisting of 272 boat slips with associated on-land infrastructure. (App. 32-34)

The marina and infrastructure were built with the approval of the Army Corps of Engineers and the Wisconsin Department of Natural Resources (DNR). (App. 32-34) As the marina development neared completion, R.W. Docks needed a final dredging permit to facilitate construction of the last 71 slips. (App. 3-4)

After eighteen years of cooperation, the Wisconsin Department of Natural Resources denied the final permit in order to protect a small emergent weed bed that had grown behind the breakwater. (App. 35; App. 3-4) The subject weed bed would never have grown except for the sheltering effect of the breakwater built by R.W. Docks and approved by the DNR. (App. 1-2) Thereafter, R.W. Docks brought an inverse condemnation action against the State of Wisconsin and the Wisconsin Department of Natural Resources.

Under the guise of the public trust doctrine, the courts of the State of Wisconsin held that R.W. Docks does not have a cognizable property interest which can be unconstitutionally taken. (App. 12) As a result, the public has gained the benefit of one acre of aquatic vegetation at the expense of more than one million of R.W. Dock's dollars.

B. FACTUAL BACKGROUND

1. This matter arises from a Wisconsin trial court decision granting summary judgment in favor of the

Respondents, State of Wisconsin and the Wisconsin Department of Natural Resources (DNR). The relevant facts are undisputed. (App. 3) An illustration depicting Port Superior Marina is reproduced in the Appendix at page 37. The shaded areas on Docks #4 and #5 consist of the 71 boat slips which are the subject of the petitioner's claim. (App. 37) With the exception of shaded areas on Docks #4 and #5, all depicted structures are currently in existence. (App. 3; 32-35)

2. In 1968, R.W. Docks applied to the Army Corps of Engineers for a permit to construct a breakwater and boat harbor in Pikes's Bay of Lake Superior in Bayfield, Wisconsin. (App. 33) At the same time R.W. Docks applied to the DNR for a permit to construct a breakwater and boat harbor, the DNR was fully apprized of the plaintiff's plan to install sailboat docks in the entire sheltered area. (App. 33) In 1969, the DNR granted the plaintiff a permit to construct a breakwater sufficient to provide a protected harbor for a marina. (App. 33) The Army Corps of Engineers also granted the necessary permit for the construction of the breakwater and boat harbor. (App. 33) Thereafter, construction of the marina moved steadily forward. As needed, R.W. Docks applied to the Wisconsin DNR for a contract to dredge material from the bed of Lake Superior. (App. 35)

The initial construction phase consisted of the breakwater, four and one half docks containing 201 boat slips, a legislated shoreline (seawall), a lagoon, pool, racquet club, tennis court, wells and water system, sewage treatment plant, lift station and sewer laterals and connections. (App. 33-34) Docks invested heavily in this infrastructure to build a marina capable of supporting

272 deep water sailing vessels. (App. 34) R.W. Docks planned to recover the cost of these investments by developing and selling the entire 272 boat slips. (App. 34)

In 1971, during the construction phase, a dispute ensued between the plaintiff and the DNR over whether the lagoon was located upland or on the lake bed. (App. 33-34) R.W. Docks assumed the lake's natural shoreline was the actual shoreline, while the DNR asserted that the actual shoreline was located somewhere inland of the natural shoreline. This dispute jeopardized the construction of Docks #4 and #5. (App. 33-34)

In resolving the dispute, R.W. Docks explained that it was necessary to own land abutting the planned positioning of docks #4 and #5 in order to complete construction of the marina. (App. 33-34) Therefore, the DNR agreed to allow R.W. Docks to construct a legislated shoreline in the upland area north of the lagoon and a quay, south of the lagoon, on the lake bed which would facilitate access to docks #4 and #5. (App. 33-34) The purpose of the quay was to secure and provide access to docks #4 and #5. (App. 33-34)

3. In 1977, the marina was converted to a condominium under Wisconsin law and recorded in the Bayfield County Register of Deeds. (App. 34; App. 38-44) A partial reproduction of the Condominium Association documents are attached to this petition as Appendix pages 38-44. The entire document is part of the lower court record and is a public document accessible through the Bayfield County Wisconsin Register of Deeds volume 307 of Records, pages 337-429.

The condominium units consist of 272 separate and distinct boat slip units which includes the 71 slips at issue. (App. 44) Each condominium unit was numbered, 1-272, and consisted of a floating boat slip and an undivided interest in the common areas and marina facilities. (App. 38-44) Two hundred and one of the units were developed and sold prior to the DNR's denial of the permit necessary to complete the remaining 71 units on docks #4 and #5. (App. 34)

4. The initial revenue from the sale of the first 201 units was used to pay for the breakwater, the existing docks and the on-land infrastructure. (App. 34) However, the revenue from these 201 units was not sufficient to recapture the costs incurred in constructing the marina. (App. 34) R.W. Docks, to date, has lost in excess of one million dollars on the marina development. (App. 34) The remaining 71 units have a combined value of approximately $1.5 million. (App. 35)

Port Superior Marina was developed on an incremental basis as demand for units warranted. For a period of eighteen years, R.W. Docks would apply to the Army Corps of Engineers for a permit to dredge and construct floating docks and then, after receiving the federal permit, contract with DNR to remove materials from the lake bed. (App. 35; App. 3)

The DNR would routinely enter contracts with the plaintiff for dredging which required only a nominal cash payment, posting of a bond, and a proper disposal of dredging spoils. (App. 35) The plaintiff complied with this regulatory scheme and relied on it in the development of the marina. (App. 35).

In 1983, Docks applied to the DNR to dredge 20,000 cubic yards of material from the lake bed to facilitate the completion of docks #4 and #5. Docks #4 and #5 were to be anchored on the quay pursuant to the 1971 agreement with the DNR. (App. 33-34) In a departure from its previous practice, the DNR, in 1986, refused to allow the requested dredging. (App. 3; App. 35)

C. JUDICIAL BACKGROUND

1. This present litigation arises from the DNR's 1986 denial of the final permit necessary to complete the marina. The basis for the DNR's refusal was that the dredging would result in the destruction of a small emergent weed bed that came into existence as a result of the calming effect of the breakwater constructed by R.W. Docks. (App. 1) But "[T]he small emergent weed bed would not have 'emerged' at all were it not for the calming effect of a breakwater the developer had built in the early stages of the project. The presence of the emergent weed bed prompted the DNR to block the developer's construction of the last set of boat slips in the marina . . . " (App. 1-2; *R.W. Docks & Slips v. State*, 2001 WI 73, 244 Wis.2d 497, 628 N.W.2d 781 (2001)).

In a previous action, R.W. Docks appealed the DNR's 1986 denial. After a series of exhaustive administrative appeals, Wisconsin Circuit Court reviews and a Wisconsin Court of Appeals' decision, *R.W. Docks and Slips v. Department of Natural Resources*, 145 Wis.2d 854, 429 N.W.2d 86 (Wis. App. 1988), R.W. Docks was ultimately and finally denied the necessary dredging permit which

would facilitate the construction of the final 71 slips. (App. 4)

2. On January 4, 1999, the plaintiff filed this present inverse condemnation action in Bayfield County, Wisconsin, alleging a taking of property without just compensation in violation of Article I, sec. 13 of the Wisconsin Constitution and the Fifth and Fourteenth Amendment of the Constitution of the United States. (App. 25)

On March 18, 1999, the Respondents, State of Wisconsin and Wisconsin Department of Natural Resources filed a motion for summary judgment seeking dismissal of the complaint. (App. 25) On October 19, 1999, the Bayfield County Circuit Court granted summary judgment in favor of the State and DNR. (App. 25-31) The Circuit Court held that the denial of the permit was not an unconstitutional taking because: 1) the right to build the additional boat slips was not part of the plaintiff's title pursuant to the public trust doctrine; 2) even if the plaintiff had a property right, such right was subject to the public trust doctrine; and 3) the plaintiff retained considerable practical use of the property and there is no evidence showing adverse economic impact resulting from state action. (App. 4, 25-30)

3. R.W. Docks filed a timely appeal to the Wisconsin Court of Appeals. (App. 18) That court affirmed, stating that Docks maintained the benefit of all or substantially all of its property. In addition, the Court of Appeals concluded that Docks assumed the risk of loss inherent in commencing a project without all necessary permits, and thus did not suffer a taking of property.

4. R.W. Docks' timely petition for review to the Wisconsin Supreme Court was accepted and on June 28, 2001, the Supreme Court of Wisconsin affirmed the lower court's decision. *R.W. Docks & Slips v. State*, 2001 WI 73, 244 Wis.2d 497, 628 N.W.2d 781 (2001). While recognizing that private property can be subject to a regulatory taking, the Wisconsin high court concluded that there are only two types of regulatory takings: those which result in some sort of "physical invasion" of private property and those which deny "all economically beneficial or productive use of land." (App. 7) Observing that R.W. Docks was not physically invaded by any regulation and that Docks still had 201 of the 272 slips, the court concluded there was no categorical taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). (App. 7)

Next, the Wisconsin Supreme Court turned to the question of whether R.W. Docks had been subjected to a regulatory taking under *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). However, before proceeding to this inquiry the court addressed the question of whether Docks had any property interest deserving of protection under the Fifth Amendment and the Wisconsin Constitution. The court noted that if Docks had no private property right, it can not have suffered an unconstitutional taking. (App. 8) While recognizing that the public trust doctrine originally existed to protect commercial navigation, the court concluded that R.W. Docks does not have a private property right because Wisconsin has "expansively interpreted [the public trust doctrine] to safeguard the public's use of navigable water for purely

recreational purposes such as boating, swimming, fishing, hunting, recreation and to preserve scenic beauty." (App. 10) The Wisconsin Supreme Court recognized that R.W. Docks does have property rights as a riparian but concluded that all such rights are subordinate to the public trust doctrine insofar as the State sees fit to expand, interpret, develop and apply the doctrine to private riparians. Thus, the court held: "Docks has failed to demonstrate a compensable regulatory taking under *Penn Central*." (App. 12)

REASONS FOR GRANTING THE WRIT

I.

A TAKING CAN OCCUR EVEN WHEN THE UNDERLYING REGULATORY ACTION IS BASED UPON THE PUBLIC TRUST DOCTRINE.

The Wisconsin Supreme Court has held that a riparian property owner can never suffer a *Penn Central* taking of his riparian rights if the governmental action is exercised pursuant to the public trust doctrine. (App. 12) Implicitly and logically it must be concluded that the Wisconsin high court decision also applies to categorical takings under *Lucas*. As the court aptly noted, if there is no private property right there can not be an unconstitutional taking. (App. 8)

1. As with many states of the Union, the public trust doctrine developed in Wisconsin as a concept which provides that the state holds beds underlying navigable waters in trust for all Wisconsin citizens. *Muench v. Public Serv. Comm'n*, 261 Wis. 492, 501-02, 53 N.W.2d 514 (1952).

The public trust doctrine, in itself, does not create legal rights, it "merely establishes standing for the state, the ability to vindicate the public trust, to assert a cause of action recognized by the existing law of Wisconsin." *State v. Deetz*, 66 Wis.2d 1, 13, 224 N.W.2d 407, 413 (1974). Originally designed to protect commercial navigation, the doctrine has been expanded to safeguard the public's use of navigable waters for enjoyment of natural scenic beauty, as well as for recreational and nonpecuniary purposes. *See State v. Trudeau*, 139 Wis.2d 91, 104, 408 N.W.2d 337 (1987); *Gillen v. City of Neenah*, 219 Wis.2d 806, 820, 580 N.W.2d 628, 633 (1998). From there it grew to public control of boating, swimming, fishing, hunting, and preservation of scenic beauty. *Oneida County v. Converse*, 173 Wis.2d 78, 83, 496 N.W.2d 124, 126 (Ct. App. 1992). And, in the present matter, the public trust doctrine was extended to enable the requisition of private property in order to protect aquatic vegetation.

With such a historical application it is obvious that this doctrine gives the state the power to regulate navigable waters. To that end, R.W. Docks never questioned the State's right, through the DNR, to regulate. However, the question is not whether the DNR has the power to regulate but, rather, has the exercise of that regulation gone "too far." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922). Indeed, in view of the decision below, the real question is whether any regulation can ever go too far? Under the Wisconsin Supreme Court's analysis of relevant takings and public trust doctrines, it can not. This Petition thus raises the critical issue of whether the public trust doctrine serves as a blanket immunity for states'

liability under the just compensation guarantee of the federal Constitution.

A detailed analysis of the historic origins of the public trust doctrine is, obviously, beyond the scope of this Petition. But some recitations are required, if only for the purpose of indicating the wide ambit of effect the Wisconsin Supreme Court's decision will have, if left unreviewed. In 1784, Virginia authorized the ceding of the Northwest territory to the Confederation upon two conditions: 1) the new states admitted to the Federal Union were to have the same sovereign rights as the original states; and 2) the navigable waters flowing into the Mississippi and the St. Lawrence rivers, and the connecting water ways were to be forever free public highways. These conditions were incorporated into the Northwest Ordinance of 1787 which provided for the government of the Northwest Territory. *Muench v. Public Service Commission*, 261 Wis. 492, 499, 53 N.W.2d 514, 516 (Wis. 1952).

Article IX, sec. 1 of the Wisconsin Constitution, incorporates verbatim the wording of the Northwest Ordinance with respect to navigable waters. The provision provides:

> "The state shall have concurrent jurisdiction on all rivers and lakes bordering on this state so far as such rivers or lakes shall form a common boundary to the state and any other state or territory now or hereafter to be formed, and bounded by the same; and the river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the state as to the citizens of the United

States, without any tax, impost or duty therefore." *Id.* at 261 Wis. 499-500, 53 N.W.2d 514, 516.

A number of jurisdictions have relied on the public trust doctrine as a categorical exclusion of governmental regulation from the ambit of the Takings Clause. Whether the doctrine is viewed as an historic artifact of the Northwest Ordinance (affecting only the common law of property in Illinois, Indiana, Wisconsin, Michigan and Minnesota), or a wider concept that is in force in every state of the Union, it is clear that it has been employed as a means of evading this Court's takings jurisprudence. *See Orion Corp. v. Washington*, 747 P.2d 1062, 1072 (Wash. 1987), cert. denied, 486 U.S. 1022 (1988); *Boston Waterfront Dev. Corp. v. Commonwealth*, 393 N.E.2d 356, 369 (Mass. 1979); *Vermont v. Central Vermont Ry.*, 571 A.2d 1128, 1135 (Vt. 1989); *National Audubon Society v. Superior Court (Mono Lake)*, 658 P.2d 709, 723 (Cal. 1983). *See also*, Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971); *Id., Takings and the Police Power*, 74 YALE L.J. 36 (1964). This is despite the fact that in what is the *locus classicus* of federal recognition of the doctrine, *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387 (1892), this Court was careful to hold that states are still obligated under the Just Compensation guarantee for certain regulatory actions. *See Id.* at 455.

2. Likewise, in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), this Court held that a categorical taking must be compensated unless the State regulation is one which prohibits a use which was never a part of the land owner's title to begin with. *Id.* at 1027. In other

words, if the State imposed restriction prohibited something that was prohibited by the "background principles" of state law or inherently noxious or a nuisance then no taking could be realized. *Id.* at 1029.

Seizing on this concept, the State of Wisconsin concluded that because the public trust doctrine is so long acquiesced as to become a rule of property, then any regulation perpetuated under that doctrine is, inherently, a noncompensable taking under *Lucas*. (App. 12) No heed is given to the fact that any such restrictive regulation was never "part of the title." The only necessary inquiry is whether the regulation was brought to life under the umbrella of the public trust doctrine. (App. 12) Likewise, the Wisconsin Supreme Court's analysis gives no recognition to the fact that the specific regulation itself was never part of a *background principle* or that the proposed use, at least in the present matter, was not noxious.

In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), this Court stated that while property can be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. But if the Wisconsin Supreme Court is to be credited, regulations promulgated under a public trust doctrine can never go too far because all such regulations, regardless of when or how they are applied, relate back to an organic law of state property. (App. 12) The narrowly-drawn exception in *Lucas* to categorical compensable takings made in accordance with "background rules" of state property law, has thus been vastly expanded by the Wisconsin Supreme Court into a hard and fast rule which is applicable without regard to factual or individual nuances of each particular regulatory action.

3. Similarly, Wisconsin courts are now able to dismiss any takings claim under *Penn Central*, 438 U.S. at 124, 127, 130 n.27. No riparian owner can ever have reasonable investment-backed expectations because his property rights are forever subordinate to the public trust doctrine and, therefore, all regulatory action exercised under its guise should have been anticipated by the riparian. As noted by the Wisconsin Supreme Court: "Assuming that riparian rights, subordinate as they are to the rights of the pubic, are included in the 'bundle of rights' recognized as private property for the purposes of Fifth Amendment taking analysis, Docks has failed to demonstrate a compensable taking under *Penn Central*." (App. 12)

Under the Wisconsin Supreme Court's approach, quick work can be made of takings claims under *Penn Central* because the *ad hoc* inquiry concerning the character of the governmental action, the economic impact of the regulation on the claimant and the extent to which the regulation interfered with distinct investment-backed expectations need never be reached. (App. 12); *Penn Central*, 438 U.S. 104, 124. "If there is no private property right there can not be an unconstitutional taking." (App. 8).

4. The Wisconsin Supreme Court's mis-step is analytically similar to the pathology of the Rhode Island Supreme Court's decision reviewed by this Court in *Palazzolo v. Rhode Island*, 121 S.Ct. 2448 (2001), which, incidently, was decided on the same day the Wisconsin Supreme Court decided the present matter. *Id.* It appears the Wisconsin courts have merely shadowed the Rhode Island concept in *Palazzolo* that a regulation in existence

prior to private ownership of property can never rise to the level of a taking. Wisconsin has simply added a new twist: the regulation need not predate the property interest so long as the regulation is promulgated under the public trust doctrine which, obviously, did predate the property interest.

In this respect, a large portion of the present question may have been addressed in *Palazzolo v. Rhode Island*, but the guidance of that decision was unavailable to the Wisconsin high court. It seems unlikely, though, that Wisconsin would have reached a different conclusion even with the benefit of the *Palazzolo* decision. Given its belief that the public trust doctrine establishes a supra-constitutional regulatory power, the Wisconsin Court's decision can not be wholly resolved by *Palazzolo*. So while Petitioner would not be adverse to this matter being GVR'ed in light of the *Palazzolo* decision, it is cognizant that the issues raised here may well require plenary review by this Court.

5. In addition to the foregoing reasons, this writ should be accepted because the Wisconsin decision is in conflict with court rulings in other navigable servitude cases. *In Palm Beach Isles Association v. United States*, 208 F.3d 1374, 1385 (Fed. Cir. 2000), it was held that in order to use a navigational servitude to avoid paying compensation the government needs to show that regulatory restriction was for a purpose related to navigation. *Id.* at 1385. Here, the Wisconsin regulation had nothing to do with navigation.

Assuming that the public trust doctrine is no more than what it was intended to be – a restriction on the

State's ability to hinder commercial navigation – then the Wisconsin decision is also in conflict with this Court's decision in *Kaiser Aetna v. United States*, 444 U.S. 164, 172 (1979) in which it was stated: "this Court has never held that the navigational servitude creates a blanket exception to the Takings Clause." *See also, Good v. United States*, 39 Fed. Cl. 81 (1997).

6. As a consequence of its application of the public trust doctrine, Wisconsin has created a rule which wholly abrogates traditional takings analysis. In *Penn Central*, this Court held that in takings law it is best to avoid any "set formula" and it is better to engage in individual "ad hoc" factual inquiries as warranted by each case. *Penn Central*, 438 U.S. at 124. In *Palazzolo*, this court flatly rejected the idea that a sweeping doctrine can eviscerate the need for each case to be analyzed under its own factual background. Here, too, it is necessary that this court address the question of whether the public trust doctrine, as applied in Wisconsin, is wholly free of Fifth Amendment limitations as developed under *Lucas*, *Penn Central* and their progeny.

II.

WHETHER THE REFUSAL TO ALLOW CONSTRUCTION OF 71 SEPARATE CONDOMINIUM UNITS IS A CATEGORICAL TAKING UNDER *LUCAS* OR PARTIAL TAKING UNDER *PENN CENTRAL*

1. According to its decisions in *R.W. Docks & Slips v. State*, 2001 WI 73, 244 Wis.2d 497, 628 N.W.2d 781 (2001); *Zealy v. City of Waukesha*, 201 Wis.2d 365, 548 N.W.2d 528 (1996) and *Eberle v. Dane County Bd. Of Adjustment*, 227

Wis.2d 609, 595 N.W.2d 730 (1999), the Wisconsin Supreme Court appears not to recognize partial regulatory takings. Wisconsin recognizes only "two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint." (App. 7) *citing, Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1015 (1992). Accordingly, Wisconsin recognizes that the first type of categorical taking involves a regulatory action that brings about an actual physical "invasion" of private property. *Id.* The second type involves regulatory actions that deny "all economically beneficial or productive use of land." *Id.*

Here, however, the Wisconsin Supreme Court concluded that because R.W. Docks has 201 of the intended 272 boat slips, Docks retained all or substantially all practical uses of its property. (App. 7) Disposing thus with R.W. Docks' claim that he had suffered a total or categorical taking under *Lucas,* the court proceeded to conclude that Docks did not actually have any property rights which could be unconstitutionally deprived and, therefore, Docks could not have suffered a taking under *Penn Central* either.

For some reason the court then proceeded with a discussion of the *Penn Central* factors. (App. 15-17) Yet, given the Wisconsin Supreme Court's conclusion that no categorical taking had occurred, what would be the point of a *Penn Central* analysis when the Wisconsin courts do not recognize that a non-physical regulatory action can result in anything less than a categorical taking? In this respect, Wisconsin jurisprudence tracks a number of jurisdictions which appear to reject even the possibility of

partial regulatory takings, and which have prescribed narrowing constructions of the "relevant parcel" being taken by regulation. *See, e.g., McQueen v. South Carolina Coastal Council*, 340 S.C. 65 (2000), vacated and remanded, 121 S.Ct. 2581 (2001); *Sea Cabins on the Ocean v. City of North Myrtle Beach*, 345 S.C. 418 (2001); *East Cape May Associates v. New Jersey*, 693 A.2d 114 (N.J. Super. 1997); *Volkema v. Department of Natural Resources*, 542 N.W.2d 282 (Mich. App. 1996), cert. denied, 525 U.S. 1040 (1998); *see also*, John E. Fee, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. CHI. L. REV. 1535, 1557 (1994).

2. These issues were well-articulated in *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994), where it was asked whether the plaintiff could maintain a taking claim under circumstances where he was precluded, by regulation, from developing only a portion of his property. *Loveladies* at 1179-80. In a footnote, the Wisconsin Court declined Petitioner's "invitation to follow the lead" of *Loveladies*. (App. 15, n.5) The problem with this footnote does not arise so much from the spurned invitation as it does from the Court's rejection of the idea that a compensable taking can result from something less than a total wipe-out of the property owner's value. *See, Lucas* at 1019 n.8 (whether a loss of some but not all economic use can result in a compensable taking). And, as noted by this Court in *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 497 (1987), "our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, [and] one of the critical questions is determining how to define the unit of property whose value is to furnish the denominator of the fraction."

The *Penn Central* analysis is intrinsically bound-up with partial regulatory takings. "[W]here a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action." *Palazzolo*, 121 S.Ct. at 2457. The analytical process set forth in *Penn Central* enables courts to decide on an ad hoc basis whether a partial taking has occurred. But the Wisconsin Supreme Court trivializes the *Penn Central* analysis by simply holding that there are no partial regulatory takings. (App. 13-14)

3. A related question raised in this petition is whether R.W. Docks' remaining 71 slips and the infrastructure associated with those slips should be viewed as individual separate pieces of property. Docks asserted, but the lower courts did not resolve, the fact that each unit is a separate parcel pursuant to the condominium declaration. (App. 34, 38-44) Likewise, the courts did not recognize that R.W. Docks sold the original 201 slips prior to the 1986 regulatory action. (App. 34; App. 7)

If the remaining 71 slips are viewed as separate from the first 201 slips then there should be no doubt that Docks has stated a valid claim for a categorical total taking under *Lucas*. Each slip is a separate and distinct parcel of real estate under Wisconsin condominium law. Each slip is a condominium unit which consists of a place on the surface of the lake and an undivided interest in the common on-land infrastructure. (App. 38-44) The removal of any one of the existing 201 slips would be a

total deprivation of that property owner's interest in his or her property. Likewise, the refusal to allow the construction of the final 71 slips is a total deprivation of 71 distinct property interests which are completely separate from the original 201.

4. The conundrum raised by the Wisconsin Supreme Court's rationale needs to be resolved here because it is at odds with the underlying purpose for the *Penn Central* analysis. "To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question." *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 644 (1993). The rule of law is, and has been, as stated in *Palazzolo*: "Our polestar instead remains the principles set forth in *Penn Central* itself and our other cases that govern partial regulatory takings. Under these cases, interference with investment-backed expectations is one of a number of factors that a court must examine." *Palazzolo*, 121 S.Ct. at 2466. Wisconsin's rejection of Petitioner's "invitation" to apply these principles is deserving of this Court's attention.

Nothing in the language of the Fifth Amendment compels a court to find a taking only when the Government divests the total ownership of the property; the Fifth Amendment prohibits the uncompensated taking of private property without reference to the owner's remaining property interests. *Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560, 1568 (Fed. Cir. 1994). This Petition thus raises the question unsuccessfully mooted in *Palazzolo*. In that decision, the Court properly regarded

the question of determining the "denominator in the takings fraction" as "difficult" and "persisting." 121 S.Ct. at 2465. Unlike in *Palazzolo*, these arguments were "pressed" below in the state courts, although by no means satisfactorily resolved.

CONCLUSION

At stake in this Petition is nothing less than the integrity of this Court's takings jurisprudence. This is true in respect not only of delimiting "background principles" of state property law that can sweepingly defeat all regulatory takings claims, but also determining the relevant parcel for purposes of both *Lucas'* categorical taking rule and *Penn Central's* balancing test. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Submitted: September 24, 2001

IN SUPREME COURT

2001 WI 73

NOTICE

This opinion is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 99-2904

STATE OF WISCONSIN

R.W. Docks & Slips,

Plaintiff-Appellant-Petitioner,

v.

State of Wisconsin and Wisconsin Department of Natural Resources,

Defendants-Respondents.

(FILED JUN. 28, 2001)

REVIEW of a decision of the Court of Appeals. *Affirmed.*

¶ 1 DIANE S. SYKES, J. This case pits a small emergent weedbed along the shores of Lake Superior in Bayfield, Wisconsin, against the developer of a private marina on those same shores. The Wisconsin Department of Natural Resources sided with the weedbed, and denied the developer a dredging permit needed to complete the final phase of the marina development. The case has an ironic twist: the small emergent weedbed would not have "emerged" at all were it not for the calming effect of a

breakwater the developer had built in the early stages of the project. The presence of the emergent weedbed prompted the DNR to block the developer's construction of the last set of boat slips in the marina, 71 out of a total of 272 slips.

¶ 2 So the developer took the DNR to court, alleging a regulatory taking without just compensation. The case was dismissed on summary judgment, and the court of appeals affirmed, concluding that because the developer retained the benefit of all or substantially all of its property – including over 200 boat slips and various recreational facilities associated with the marina onshore – the denial of a permit for the construction of the remaining boat slips was not an unconstitutional taking.

¶ 3 We affirm. As takings law has evolved, there is no compensable categorical taking unless the regulatory action in question deprives a property owner of all economically beneficial use of his property. We do not perform the analysis piecemeal, but, rather, consider the property as a whole in order to determine the extent of the deprivation. Because the denial of the dredging permit did not deny the marina developer all economically beneficial use of its property, there was no categorical regulatory taking.

¶ 4 Further, and again considering the property as a whole, the regulatory action in this case at most affected only the developer's riparian right of reasonable access to the lake, which is subordinate to the public trust doctrine. Therefore, the DNR's action did not so severely impact or interfere with the developer's reasonable investment

expectations as to constitute an unconstitutional taking under traditional, ad hoc takings analysis.

I

¶ 5 The relevant facts are undisputed. R.W. Docks, a general partnership in the business of developing marinas, is the riparian owner of 1100 feet of frontage along Lake Superior in Bayfield, Wisconsin. In 1969, Docks began building a marina, called Port Superior, on this lake frontage land. At the outset, Docks sought and obtained permits from the DNR and the Army Corps of Engineers to construct a breakwater and boat harbor in connection with the marina development.

¶ 6 The marina was then built in stages. The initial phases of the project consisted of the breakwater, several docks eventually containing 201 boat slips, a sea wall, a lagoon, a solid pile quay structure placed on the lakebed, a port, racquetball club, tennis court, and supporting infrastructure. Throughout the gradual development of the marina, Docks sought and received the necessary permits from the DNR, including dredging permits pursuant to Wis. Stat. § 30.20.

¶ 7 In 1977, Docks converted the marina into condominiums. The 201 condominium boat slips, each of which included an undivided interest in the common areas of the marina facilities, were developed and sold before Docks obtained the necessary permits to complete construction of the final 71 boat slips at the marina.

¶ 8 In 1983, Docks applied to the DNR for a permit to dredge 20,000 cubic yards of material from the lakebed,

a necessary prerequisite to the completion of the remaining 71 boat slips. The DNR, after expressing concern over the environmental impact of the dredging, divided the application in two, the first to remove 5,000 cubic yards, and the second to remove 15,000 cubic yards of lakebed material. The DNR then granted the first dredging permit. In 1986, the DNR denied the second, larger dredging permit, and without the permit, the final 71 boat slips could not be built.

¶ 9 The permit was denied primarily because a small emergent weedbed had developed near the shore within the marina as a result of the sheltering effect of the breakwater that Docks had built. Weedbeds, evidently, are good for many things, including the proliferation of game fish, forage fish and associated macroinvertebrates and zooplankton, and so the DNR acted to protect this environmentally sensitive natural resource.

¶ 10 After exhausting available administrative appeals and judicial review of the DNR's action, Docks sued the DNR in circuit court alleging an unconstitutional taking of its property without just compensation. The Bayfield County Circuit Court, the Honorable Thomas J. Gallagher, granted the DNR's motion for summary judgment, concluding that: (1) Docks did not have a recognizable property interest in the 71 undeveloped boat slips; (2) even if Docks had a recognizable property interest in the 71 undeveloped boat slips, there was no unconstitutional taking because its riparian right to construct structures on the bed of Lake Superior was subject to the public trust doctrine; and (3) there was no unconstitutional taking because Docks retained considerable practical use of the property.

¶ 11 The court of appeals affirmed only the last conclusion of the circuit court, refraining from addressing the alternate arguments. The court of appeals agreed that the denial of the final dredging permit did not constitute a regulatory taking because Docks maintained the benefit and use of all or substantially all of its marina property. Furthermore, the court concluded that Docks assumed the risk inherent in commencing the project without all necessary permits, and therefore any economic loss it suffered as a result of the inability to build the last 71 slips could not be transferred to the State on a regulatory takings theory. We accepted review.

II

¶ 12 We review a circuit court's decision granting or denying a motion for summary judgment independently, using the same methodology as the circuit court. *Wisconsin Dep't of Corrections v. Kliesmet*, 211 Wis. 2d 254, 259, 564 N.W.2d 742 (1997); Wis. Stat. § 802.08(2). "[S]ummary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Kenefick v. Hitchcock*, 187 Wis. 2d 218, 224, 522 N.W.2d 261 (Ct. App. 1994).

¶ 13 The issue in this case is whether the DNR's denial of the final dredging permit constituted a regulatory taking of Docks' property without just compensation. This is also a question of law that we review without deference to the lower courts. *Zealy v. City of Waukesha*, 201 Wis. 2d 365, 372, 548 N.W.2d 528 (1996). The Fifth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment,

provides that private property shall not "be taken for public use, without just compensation." Article I, Section 13 of the Wisconsin Constitution provides that "[t]he property of no person shall be taken for public use without just compensation therefor." We have stated that:

> Takings jurisprudence has developed from two competing principles: on one hand, respect for the property rights of individuals; on the other, recognition that the government retains the ability, in furtherance of the interests of all citizens, to regulate an owner's potential uses of land. Thus, in *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926), the United States Supreme Court held municipal zoning to be a permissible exercise of the police power, while in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 159-60, 67 L.Ed. 322 (1922), the Court held that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." Such takings are described as "constructive" or "regulatory" takings.

Zealy, 201 Wis. 2d at 373.

¶ 14 "A 'taking' need not arise from an actual physical occupation of land by the government." *Eberle v. Dane County Bd. of Adjust.*, 227 Wis. 2d 609, 621, 595 N.W.2d 739 (1999). If a regulatory restriction or action of the government deprives a property owner of all economically beneficial use of his property, there has been a categorical regulatory taking subject to compensation. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992); *Zealy*, 201 Wis. 2d at 374-75.

¶ 15 In determining whether a regulatory restriction "goes too far" for purposes of the Fifth Amendment, the United States Supreme Court has generally "eschewed any 'set formula' for determining how far is too far, preferring to 'engag[e] in . . . essentially ad hoc, factual inquiries." *Lucas*, 505 U.S. at 1015 (citing *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)); *Zealy*, 201 Wis. 2d at 373. However, the Supreme Court has recognized "at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint." *Lucas*, 505 U.S. at 1015. The first includes regulatory actions that bring about some form of physical "invasion" of private property. *Id.* The second includes regulatory actions that deny "all economically beneficial or productive use of land." *Id.* We have in Wisconsin interpreted this latter category to include regulatory actions that "deny the landowner all or substantially all practical uses of a property." *Eberle*, 227 Wis. 2d at 622; *Zealy*, 201 Wis. 2d at 374.

¶ 16 The DNR's denial of the dredge permit in this case did not bring about a physical invasion of private property. Nor did it deny Docks all economically beneficial or productive use of its property, or substantially all practical use of its property, inasmuch as it retained the economic benefit and use of the 201 boat slips and related recreational facilities at the marina. Accordingly, there has been no categorical regulatory taking under *Lucas* and *Zealy*.

¶ 17 We are left, then, with the ad hoc factual, traditional takings inquiry of *Penn Central* and *Zealy*. This involves an analysis of the nature and character of the

governmental action, the severity of the economic impact of the regulation on the property owner, and the degree to which the regulation has interfered with the property owner's distinct investment-backed expectations in the property. *Zealy*, 201 Wis. 2d at 374 (citing *Penn Cent.*, 438 U.S. at 124).

¶ 18 But first there is a threshold question, and that is the nature and extent of the private property interest at stake here. This case involves riparian rights, which are subject to and limited by the public trust doctrine. The State argues that the bed and waters of Lake Superior belong to the public, not Docks, and so no taking of private property occurred. Indeed, the Supreme Court has stated that:

> [t]he hallmark of a protected property interest is the right to exclude others. That is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979). That is why the right that we all possess to use the public lands is not the "property" right of anyone – hence the sardonic maxim, explaining what economists call the "tragedy of the commons," *res publica, res nullius.*

Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 673 (1999). If Docks had no private property right to place boat slips on the lakebed at the marina, it cannot have suffered an unconstitutional taking.

¶ 19 The public trust doctrine originated in the Northwest Ordinance of 1787 and the Wisconsin Constitution, Article IX, Section 1.[1] *See Gillen v. City of Neenah*, 219 Wis. 2d 806, 820, 580 N.W.2d 628 (1998). The state holds title to the beds of lakes, ponds, and rivers as follows:

> "The title to the beds of all lakes and ponds, and of rivers navigable in fact as well, *up to the* line of ordinary high-water mark, within the boundaries of the state, became vested in [the state] at the instant of its admission into the Union, in trust to hold the same so as to preserve to the people forever the enjoyment of the waters of such lakes, ponds, and rivers, to the same extent that the public are entitled to enjoy tidal waters at the common law."

State v. Trudeau, 139 Wis. 2d 91, 101, 408 N.W.2d 337 (1987) (quoting *Illinois Steel Co. v. Bilot*, 109 Wis. 418, 425, 84 N.W. 855 (1901)). This includes the beds of the Great Lakes as well as lesser inland waters. *Id.* Public ownership of the bed of a lake applies whether the water is

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[1] Wisconsin Const. art. IX, § 1 states:

> Jurisdiction on rivers and lakes; navigable waters. The state shall have concurrent jurisdiction on all rivers and lakes bordering on this state so far as such rivers or lakes shall form a common boundary to the state and any other state or territory now or hereafter to be formed, and bounded by the same; and the river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well as to the inhabitants of the state as to the citizens of the United States, without any tax, impost or duty therefor.

deep or shallow, and extends to areas covered with aquatic vegetation within the ordinary high water mark of the body of water in question.[2] *Id.* at 103-04. Although the public trust doctrine originally existed to protect commercial navigation, it has been expansively interpreted to safeguard the public's use of navigable waters for purely recreational purposes such as boating, swimming, fishing, hunting, recreation, and to preserve scenic beauty. *See State v. Bleck*, 114 Wis. 2d 454, 457, 338 N.W.2d 492 (1983); *see also Gillen*, 219 Wis. 2d at 820.

¶ 20 The legislature administers the trust for the protection of the public's rights, and it may use the power of regulation to effectuate the intent of the trust. *Id.* at 498. In this regard, as applicable here, the legislature has declared it to be unlawful to place a structure on the bed of a navigable waterway unless a permit has been granted by the DNR, or unless the structure is otherwise authorized by statute.[3] *See* Wis. Stats. §§ 30.12, 30.13; *Cassidy v. DNR*, 132 Wis. 2d 153, 158, 390 N.W.2d 81 (Ct. App. 1986). Further, the legislature has prohibited the

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[2] The high water mark is: "[T]he point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic." *State v. Trudeau*, 139 Wis. 2d 91, 102, 408 N.W.2d 337 (1987) (citing *Lawrence v. American W.P. Co.*, 144 Wis. 556, 562, 128 N.W. 440 (1911)).

[3] A "structure" for these purposes has been defined as "something constructed or built . . . something made up of more or less interdependent elements or parts." *State v. Bleck*, 114 Wis. 2d 454, 463, 338 N.W.2d 492 (1983).

removal of material from the bed of a navigable waterway without a permit. Wis. Stat. § 30.20.

¶ 21 However, subject to the requirements of the public trust doctrine, "Wisconsin has . . . recognized the existence of certain common law rights that are incidents of riparian ownership of property adjacent to a body of water." *Bleck*, 114 Wis. 2d at 466. These include:

> [t]he right to reasonable use of the waters for domestic, agricultural and recreational purposes; the right to use the shoreline and have access to the waters; the right to any lands formed by accretion or reliction; the right to have water flow to the land without artificial obstruction; the limited right to intrude onto the lakebed to construct devices for protection from erosion; and the right, now conditioned by statute, to construct a pier or similar structure in aid of navigation.

Cassidy v. DNR, 132 Wis. 2d at 159 (footnotes omitted).

¶ 22 The rights of riparian owners, however, are qualified, subordinate, and subject to the paramount interest of the state and the paramount rights of the public in navigable waters. *Bleck*, 114 Wis. 2d at 467-68. The common law only requires that riparian owners be allowed reasonable access and use. *Sterlingworth Condo. Ass'n, Inc. v. DNR*, 205 Wis. 2d 710, 731, 556 N.W.2d 791 (Ct. App. 1996).

> [E]very . . . right which a riparian owner acquires, as such, to the waters . . . by his land, is restricted always to that which is a . . . reasonable use, and these terms are to be measured and determined by the extent and capacity of the [lake], the uses to which it has been put, and

> the rights that other riparian owners on the same [lake] also have.

Id. (citing *Apfelbacher v. State*, 167 Wis. 233, 239, 167 N.W. 244, 245 (1918); *State v. Zawistowski*, 95 Wis. 2d 250, 261-62, 290 N.W.2d 303, 309 (1980)).

¶ 23 The public trust doctrine as an encumbrance on riparian rights is established "by judicial authority so long acquiesced in as to become a rule of property." *Franzini v. Layland*, 120 Wis. 72, 81, 97 N.W. 499 (1903). It is part of the organic law of the state, and is to be broadly and beneficially construed. *Diana Shooting Club v. Husting*, 156 Wis. 261, 271-72, 145 N.W. 816 (1914).

¶ 24 The DNR's denial of the dredging permit affected only Docks' ability to construct the final 71 boat slips on the bed and in the waters of Lake Superior, and, as such, implicated only Docks' riparian rights, which are subject to the public trust doctrine. Assuming that riparian rights, subordinate as they are to the rights of the public, are included in the "bundle of rights" recognized as private property for purposes of Fifth Amendment takings analysis, Docks has failed to demonstrate a compensable regulatory taking under *Penn Central* and *Zealy*.[4]

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[4] Docks claimed at oral argument that *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913) supported its position that it had a property right for Fifth Amendment purposes in the 71 additional boat slips. The riparian property owner in *Chandler-Dunbar* claimed a right to construct in the river and upon its land such structures as were necessary to control and use the current of the river for commercial purposes, provided only that such structures not impede or hinder navigation. As the Court noted, under state law, the owner of riparian land carried title all the way to the middle

¶ 25 In *Zealy*, we noted that the United States Supreme Court has not endorsed an analysis that subdivides a contiguous property for purposes of determining whether a compensable taking has occurred. *Zealy*, 201 Wis. 2d at 375-76.

> [R]ather, the Court has consistently held that a landowner's property in such a case should be considered as a whole.
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> > " 'Taking' " jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole. . . .
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> *Penn Central*, 438 U.S. at 130-31, 98 S.Ct. at 2662-63. Similarly, in *Keystone* [*Bituminous Coal*

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thread of the riverbed. However, the Court found this title to be qualified at best, subordinate to the public right of navigation. The Court stated that the riparian owner had the "right of access to deep water, and when not forbidden by public law may construct for this purpose, wharves, docks, and piers in the shallow water of the shore. But every such structure in the water of a navigable river is subordinate to the right of navigation, and subject to the obligation to suffer the consequences of the improvement of navigation, and must be removed if Congress, in the assertion of its power over navigation, shall determine that their continuance is detrimental to the public interest in the navigation of the river" *Id.* at 70. Thus, Docks' reliance on this case is misplaced. *Chandler-Dunbar* actually stands for the proposition riparian rights are subject to the public's superior rights.

> *Ass'n v. DeBenedictis*], 480 U.S. at 498 107 S.Ct. at 1248-49, the Court noted practical arguments against allowing the segmentation of the property at issue:
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> > "Many zoning ordinances place limits on the property owner's right to make profitable use of some segments of his property. A requirement that a building occupy no more than a specified percentage of the lot on which it is located could be characterized as a taking of the vacant area. . . . [O]ne could always argue that a setback ordinance requiring that no structure be built within a certain distance from the property line constitutes a taking because the footage represents a distinct segment of property for takings law purposes."

Zealy, 201 Wis. 2d at 376.

¶ 26 The Supreme Court has reaffirmed its opposition to subdividing property for purposes of takings analysis:

> [W]e rejected this analysis years ago in *Penn Central* . . . where we held that a claimant's parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable. To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question.

Concrete Pipe & Prods. v. Constr. Laborers Pension Trust, 508 U.S. 602, 642-44 (1993).

¶ 27 Accordingly, we evaluate the character of the DNR's action, its economic impact and the degree to which it interfered with Docks' investment-backed expectations in light of the marina as a whole rather than the parcel that was to have contained the 71 boat slips.[5] And we do so recognizing that at most, only riparian rights of reasonable access and use, subject to the public trust doctrine, are implicated here.

¶ 28 The DNR acted primarily to protect an emergent weedbed on behalf of the public, and secondarily, to prevent interference with the rights of neighboring riparian owners. Reasonable minds can differ about whether governmental protection of weedbeds is of such a character as to outweigh private property interests. But the state, not Docks, holds title to the lakebed, and therefore, to the extent that a private property interest is implicated here, it is riparian only and therefore qualified in nature, encumbered by the public trust doctrine. We have "jealously guarded the navigable waters of this state and the rights of the public to use and enjoy them." *Delta Fish and Fur Farms v. Pierce*, 203 Wis. 519, 523, 234 N.W. 881 (1931). The character of the governmental action in this case,

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[5] Docks invites us to follow the lead of the United States Court of Appeals for the Federal Circuit in *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994), and adopt "a flexible approach, designed to account for factual nuances" in determining whether to consider the property as a whole or only that portion affected by the regulatory action in question. We declined to do so in *Zealy v. City of Waukesha*, 201 Wis. 2d 365, 378, 548 N.W.2d 528 (1996), and also decline to do so here, where the private property right asserted is so limited.

therefore, weighs against a finding that Docks has suffered a compensable regulatory taking.

¶ 29 Similarly, our evaluation of the severity of the economic impact of the DNR's action, and the extent to which it interfered with Docks' investment-backed expectations, is strongly influenced by the fact that the development of this private marina on the bed and waters of Lake Superior was encumbered by the public trust doctrine and heavily regulated from the get-go. A riparian owner may apply to the DNR for a permit to remove material from or erect a structure on the bed of a navigable waterway in order to facilitate reasonable access and use. But the riparian owner does not have a right to the issuance of a permit if it is detrimental to the public interest. *See* Wis. Stat. §§ 30.12, 30.13 and 30.20.

¶ 30 Docks alleges that the revenue from the sale of the 201 existing boat slips was insufficient to cover the cost of developing the marina and that it has to date lost in excess of $1 million. It claims that the final 71 boat slips would have a combined value of approximately $1.5 million, enough to cover its losses and make a small profit. But the fact that the marina development has thus far yielded a loss does not make out a takings case, and Docks never possessed an unfettered "right" to a particular number of boat slips in the first place. Under the circumstances of this case, the DNR's action cannot be said to have "gone too far" to cause the sort of negative economic impact or substantial interference with investment expectations as to amount to a regulatory taking.

¶ 31 In any event, the DNR's denial of the final dredging permit has not interfered with Docks' present

economic use of its property, considered as a whole. It has a 201-slip marina, and associated recreational facilities, and may have other means of recouping its losses. It is true that Docks' plans for a larger marina have been frustrated, but those plans were encumbered by the public trust doctrine and contingent upon the periodic issuance of DNR permits from the beginning. *See Concrete Pipe*, 508 U.S. at 645 (rejecting takings claim where claimant "had long been subject to federal regulation, and '[t]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end' ").

¶ 32 Accordingly, we conclude that the DNR's denial of the final dredging permit did not deny Docks all economically beneficial use of its property, or substantially all practical use of its property, and as such, did not constitute a categorical regulatory taking. In addition, because the DNR's action affected only riparian rights, subordinate to the public trust doctrine, and affected only a small portion of the marina development as a whole, it cannot be said to have resulted in the sort of severe economic impact or interference with distinct investment-backed expectations as to constitute a regulatory taking under traditional, ad hoc takings analysis.

By the Court. – The decision of the court of appeals is affirmed.

COURT OF APPEALS
DECISION
DATED AND FILED

July 11, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

No. 99-2904

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT III

R.W. DOCKS & SLIPS,

PLAINTIFF-APPELLANT,

v.

STATE OF WISCONSIN AND WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Bayfield County: THOMAS J. GALLAGHER, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. R.W. Docks & Slips appeals from a summary judgment dismissing Docks' claim against the

Wisconsin Department of Natural Resources. Docks argues that the circuit court erred by concluding that the DNR's denial of a dredging permit did not constitute a regulatory taking. Because Docks maintains the benefit of all or substantially all of its property and because it assumed the risk of loss inherent in commencing a project without all necessary permits, we affirm the circuit court's judgment dismissing Docks' claim.

Background

¶2 The relevant facts are undisputed. Docks, a general partnership in the business of developing recreational marinas, developed Port Superior in Bayfield. Port Superior was designed to consist of 272 boat slips. In 1986, the DNR refused to grant Docks the dredging permit necessary to construct the remaining seventy-one of its 272 planned boat slips. After exhausting the available administrative appeals, Docks filed suit against the DNR in circuit court, alleging a taking of property without just compensation in violation of both the state and federal constitutions. The circuit court subsequently granted the DNR's motion for summary judgment and this appeal followed.

Analysis

¶3 Whether summary judgment was appropriately granted presents a question of law that we review independently of the circuit court. *See* ***Fortier v. Flambeau Plastics Co.***, 164 Wis. 2d 639, 651-52, 476 N.W.2d 593 (Ct. App. 1991). When reviewing summary judgments, we utilize the same analysis as the circuit court and must

apply the standards set forth in WIS. STAT. § 802.08(2). *See* ***Schultz v. Industrial Coils***, 125 Wis. 2d 520, 521, 373 N.W.2d 74 (Ct. App. 1985). In general, "summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." ***Kenefick v. Hitchcock***, 187 Wis. 2d 218, 224, 522 N.W.2d 261 (Ct. App. 1994).

¶4 The circuit court concluded that (1) Docks did not have a recognizable property interest in the seventy-one undeveloped boat slips; (2) even if Docks had a recognizable property interest in the undeveloped boat slips, its interest was subject to the public trust doctrine;[1] and (3) in any event, there was no unconstitutional taking because Docks has retained considerable practical use of the property. Docks contends that the circuit court mischaracterized its argument. It concedes that the DNR had the authority to deny the permits necessary to develop the remaining boat slips. Docks argues, however, that the DNR's denial of the dredging permit necessary to complete the remaining seventy-one boat slips constituted a regulatory taking of Docks' property without just compensation. Specifically, Docks contends that the DNR's denial of the dredging permit either deprived Docks of substantially all of the beneficial use of its property or deprived it of its reasonable investment expectations.

---

[1] Under the public trust doctrine, "the state holds the beds of navigable waters in trust for all of its citizens." ***State v. Bleck***, 114 Wis. 2d 454, 465, 338 N.W.2d 492 (1983). Although originally designed to protect commercial navigation, the doctrine "has been expanded to safeguard the public's use of navigable waters for purely recreational and nonpecuniary purposes." ***Id.***

¶5 The issue of whether the DNR's denial of the dredging permit constituted a regulatory taking of Docks' property without just compensation is a question of law that this court reviews de novo. *See* ***Zealy v. City of Waukesha***, 201 Wis. 2d 365, 372, 548 N.W.2d 528 (1996). Article I, § 13 of the Wisconsin Constitution provides: "The property of no person shall be taken for public use without just compensation therefor." Our supreme court has recognized, however, that a taking "need not arise from an actual physical occupation of land by the government." ***Eberle v. Dane Cty. Bd. of Adjust.***, 227 Wis. 2d 609, 621, 595 N.W.2d 730 (1999). Rather, "[t]here can be a 'taking' if a restriction, short of an actual occupation, deprives the owner of all, or substantially all, of the beneficial use of his property." ***Id.*** (quoting ***Howell Plaza, Inc. v. State Highway Comm'n***, 66 Wis. 2d 720, 726, 226 N.W.2d 185 (1975)). Takings that do not involve physical invasions of land are called "regulatory takings." ***Id.*** at 622.

¶6 When a landowner alleges a regulatory taking, a court should examine the following factors: (1) the character of the governmental action; (2) the economic impact of the regulation on the claimant; and (3) the extent to which the regulation has interfered with distinct investment-backed expectations. *See* ***Zealy***, 201 Wis. 2d at 374. Although a court should consider these factors, "the rule emerging from opinions of our state courts and the United States Supreme Court is that a regulation must deny the landowner all or substantially all practical uses of a property in order to be considered a taking for which compensation is required." ***Id.***

¶7 Before determining whether a regulatory taking has occurred, however, a court must first determine what is the property at issue. *See id.* at 375. Our supreme court has recognized that a landowner's property should be considered as a whole:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole.

Id. at 376 (quoting ***Penn Cent. Transp. Co. v. New York City***, 438 U.S. 104, 130-31 (1978)). To the extent that Docks may argue that it has been deprived of all or substantially all of the beneficial use of its property, it is mistaken. We do not look to the value of the undeveloped boat slips, but rather to the value of Docks' property as a whole. Further, any depreciation in the property's value must not be based upon changing the character of the land at the expense of harm to public rights. *See id.* at 380. Despite its inability to develop the seventy-one boat slips, Docks retains the reasonable use of the whole of its riparian property, including the existing 201 boat slips, marina and appurtenant structures.

¶8 Docks nevertheless argues that its investment-backed expectations have been thwarted. It contends:

> [T]he taking has resulted from government approval of the development of marina facilities and infrastructure necessary to incorporate five

> main docks and then, after the facilities and infrastructure have been built, refusing the necessary permit to complete the marina in order to protect a weedbed that would have never grown but for R.W. Docks' investments.

Conversely, the DNR responds that "a property owner who acquires and begins to develop property knowing that permits are required to do so, cannot presume the permits will be granted, and assumes the risk of loss in the event of a denial." We agree. Although Docks intimates that the DNR granted the previous permits with knowledge of Docks' intent to ultimately build 272 boat slips, it nevertheless concedes that it did not have all permits necessary to complete the project and further concedes that the DNR had the authority to deny the necessary permits. As such, Docks should not have presumed that all necessary permits would be granted. It assumed the risk of loss in the event of the DNR's denial of the permits sought.

¶9 Because Docks maintains the benefit of all or substantially all of its property and because it assumed the risk of loss inherent in commencing a project without all necessary permits, we affirm the circuit court's judgment dismissing Docks' claim.[2]

By the Court. – Judgment affirmed.

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[2] We refrain from addressing any alternative arguments because only dispositive issues need be addressed. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983).

Not recommended for publication in the official reports.

STATE OF WISCONSIN BAYFIELD COUNTY
CIRCUIT COURT

R. W. DOCKS & SLIPS,

Plaintiff,

v. Case No. 99-CV-1

STATE OF WISCONSIN and
WISCONSIN DEPARTMENT OF
NATURAL RESOURCES,

Defendants.

ORDER AND JUDGMENT

(FILED OCT. 19, 1999)

The plaintiff R. W. Docks & Slips filed this action claiming that the denial of a permit to develop 71 additional slips in its 201-slip marina was a taking of private property without compensation, in violation of the state and federal constitutions. The defendants State of Wisconsin and Wisconsin Department of Natural Resources moved for summary judgment dismissing the complaint. The parties filed briefs and supporting documents, and a hearing on the motion was held before the court on August 31, 1999. The plaintiff appeared by its attorneys Bruce A. Rasmussen and Don P. Novitzke, and the defendants appeared by Assistant Attorney General JoAnne F. Kloppenburg. At the hearing the court issued an oral decision, having reviewed the pleadings, briefs and papers filed with the court and having heard the arguments at the hearing.

For the reasons stated in the oral decision on August 31, 1999, a transcript of which is attached and incorporated by reference, the court finds that 1) there is no recognizable property interest in the additional 71 slips because under the longstanding common law principle of the public trust doctrine the right to build these additional slips was not part of the plaintiff's title, 2) even if there is a recognizable property interest that could be taken, there was no unconstitutional taking because the plaintiff's riparian rights to construct structures on the surface and above the bed of Lake Superior were always subject to the public trust doctrine, which has long been in place in Wisconsin, and 3) even if there is a recognizable property interest, there was no unconstitutional taking because the plaintiff has retained considerable practical use of the property in that it has built and sold 201 slips, the property is not valueless but is worth at least $2 million, and there is no evidence showing adverse economic impact resulting from the state action.

NOW, THEREFORE, IT IS ORDERED that:

1. The defendants' motion for summary judgment is GRANTED.

2. The complaint is DISMISSED.

3. JUDGEMENT is ENTERED with costs in the amount of $100 in favor of the defendants.

Dated this 19 day of October, 1999.

BY THE COURT:

/s/ Thomas J. Gallagher
THOMAS J. GALLAGHER
Circuit Court Judge

STATE OF WISCONSIN BAYFIELD COUNTY
CIRCUIT COURT

R. W. DOCKS & SLIPS,

Plaintiff,

vs.

STATE OF WISCONSIN and
WISCONSIN D.N.R.,

Defendants. Case No. 99-CV-01

HONORABLE THOMAS J. GALLAGHER, PRESIDING

PARTIAL TRANSCRIPT

DECISION

Hearing held on August 31, 1999 at the Bayfield County Courthouse, Washburn, WI

Appearances: For the Plaintiff:
Mr. Don Paul Novitzke,
Attorney of Record
Mr. Bruce Rasmussen,
Attorney at Law

For the Defendant:
Ms JoAnne Kloppenburg,
Assistant Attorney Gen.

[2] THE COURT: Alright, here's what I'm going to do. I'm going to grant the defendant's motion for summary judgement dismissing the plaintiff's complaint on the merits, together with the taxable costs and disbursements of the action. And here's why:

First of all, I find that the plaintiffs have no recognizable property interest at stake in this case. What the plaintiffs are claiming in the complaint, and I have to liberally construe the complaint in the plaintiffs' favor to even go by the test as to whether it states a cause of action, is that the plaintiff somehow has a property, recognizable property interest, in developing 71 more boat slips than are already there. Plaintiff has developed a marina, there's breakwater, already 201 slips. There's already considerable improvements connected with the marina on the riparian land adjacent to Lake Superior to which the plaintiffs claim, I guess, that it owns, although that's not entirely clear to me, liberally construing the complaint I will give them that. The 71 boat slips do not exist today, they have not been built, and they will not apparently be built, because they cannot obtain the approval they need to build them from the Department of Natural Resources. Those decisions were made by the Department, and by Administrative Law Decision, and

by Circuit Court Decision affirming the Administrative Law Decision. At least one of the Administrative Law Decisions apparently was not even taken for review in the Circuit Court, that's concerning the estoppel issue. So it's settled, as far as this case goes, they're not going to be [3] able to develop the remaining 71 boat slips which were to be built on the surface of Lake Superior.

Plaintiff on the one hand contends that the 71 boat slips are somehow a recognizable property interest of riparian land owner, even though they don't exist, and on the other hand claim that condominium declaration filed in the Register of Deeds Office in this county creates this recognizable property interest in the 71 boat slips, which apparently are, I'm satisfied are included in the condominium declaration. That's on record. No approval by anyone were necessary to record these condominium declarations. All they had to do was hire a surveyor, have some lawyer draft the condominium declaration as to conform to the statute and title them to be recorded in the Register of Deeds Office. I do not find that creates recognizable property interest under either the Fifth Amendment, or the Wisconsin Constitution. These 71 slips that exist only in condominium declaration cannot be conveyed today they do not exist. Any right of riparian land owner, including the right to develop these condominium slips that are in the declaration are qualified by the Public Trust Doctrine in this State where the State owns the bed of Lake Superior. That's a long standing common law tradition, so that such use of riparian rights by the plaintiff were always not part of its title to begin with. Even if somehow one can find that there is a recognizable property interest that could be taken, there's been no taking.

As I indicated earlier, such a right was always subject to the property . . . subject to the Public Trust and well understood for [4] centuries in this State that the State powers over the Public Trust Doctrine, or under the Public Trust Doctrine over construction on the surface of Lake Superior and above the bed of Lake Superior. That anyone who acquired riparian rights takes that title subject to the Public Trust Doctrine.

Further, the plaintiff has had reasonable use of the property. They have constructed a considerable marina development. They have constructed 21, and sold . . . not 21, 201, and sold 201 boat slips under condominium ownership. This property is not valueless. The plaintiffs themselves give the riparian real estate a value at the present time of $2 million Dollars. They have retained a considerable practical use of the property. They apparently no longer have an active interest in the operation of the marina, but they could have, and I'm not satisfied, in any event, that the evidence submitted by the plaintiff in opposition to the motion show any adverse economic impact. And even if it did that was probably due to business decision, or other development problems that were made, or created by the plaintiff.

For those reasons I'm not even going to bother to go to the just compensation issue. And Ms Kloppenburg, do you want to draft something?

MS KLOPPENBURG: Certainly.

THE COURT: Thank you.

. . .

I, DELORES KITTLESON, do hereby certify that the above transcript is a complete and accurate copy of the proceedings taken by me on the Stenograph Machine, and transcribed into typewritten form by myself.

Dated: 9-29-99

/s/ Delores Kittleson
DELORES KITTLESON
CIRCUIT COURT REPORTER
BAYFIELD COUNTY
COURTHOUSE
P. O. BOX 12
WASHBURN, WI 54891

CIRCUIT COURT

STATE OF WISCONSIN BAYFIELD COUNTY

R. W. DOCKS & SLIPS,

Plaintiff,

v. Case No. 990-CV-1

STATE OF WISCONSIN and
WISCONSIN DEPARTMENT OF
NATURAL RESOURCES,

Defendants.

AFFIDAVIT OF ROBERT F. HOLMGREN

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

Robert F. Holmgren, being duly sworn and on his oath, deposes and says of his own personal knowledge:

1. I am the managing agent of plaintiff and have been since the inception of the Pike's Bay Marina project in Bayfield County, Wisconsin in 1968.

2. Attached hereto is an illustration which accurately depicts Port Superior Marina at the time of the proceedings herein.

3. Plaintiff acquired the parcel of real estate riparian to Pike's Bay in 1968 for the purpose of developing a sheltered harbor with depths sufficient to accommodate sailboats.

4. In 1968, plaintiff applied to the U. S. Army Corps of Engineers for a permit to construct a breakwater and boat harbor. I fully apprised officials of the Corps of plaintiff's plans to install sailboat docks in the entire sheltered harbor. The Corps gave plaintiff permission to proceed and in 1972 formally issued a permit "to construct a breakwater and boat harbor in Pike's Bay on Lake Superior in Bayfield, Wisconsin."

5. Upon receiving permission from the Corps to proceed, plaintiff applied to the Department of Natural Resources for a contract to remove materials from the bed of Lake Superior. A contract was made between the Department of Natural Resources and Plaintiff on December 30, 1968.

6. In 1968, plaintiff also applied to the Department of Natural Resources for a permit to construct a breakwater and boat harbor. I fully apprised officials of the Department of Natural Resources of plaintiff's plans to install sailboat docks in the entire sheltered harbor. In 1969, the Department issued plaintiff a permit to construct a breakwater on the bed of Lake Superior "to provide a protected harbor for a marina."

7. In 1971, plaintiff commenced construction of a lagoon in what it considered upland on the assumption that the shoreline of the lake was the natural shoreline. A dispute ensued with the Department of Natural Resources over whether the lagoon was actually on the lakebed. I explained to officials of the Department of Natural Resources that it was necessary for plaintiff to own the real estate which subtended docks 4 and 5 as construction of those docks was necessary to complete

the marina. The Department of Natural Resources and plaintiff ultimately reached a negotiated settlement which was designed to permit plaintiff to construct docks 4 and 5. The Department of Natural Resources and plaintiff agreed to a legislated shoreline in the upland which gave plaintiff riparian rights to the area occupied by docks 4 and 5 and the Department of Natural Resources agreed to grant plaintiff, as riparian owner, a permit to construct a structure on the bed of the lake. The purpose of the structure, called the quay, was to serve as the base of docks 4 and 5 of the marina.

8. In 1977, plaintiff converted the marina to a 272 boat/slip marina condominium under Wisconsin law. Two hundred one of these condominium units were developed and sold.

9. Plaintiff invested heavily in the improvements required by a first class marina of 272 boat slips. Among the improvements made by plaintiff are land acquisition, breakwater, seawall, dredging, pool and racquet club, swimming pool, tennis court, surfacing and landscaping, wells and water system, sewage treatment plant, lift station and force main, sewer laterals and connections.

10. Plaintiff planned to recover its investment by developing and selling the entire 272 condominium units. The revenues from the first units sold would be used to pay for the improvements and plaintiffs profit, if any, would be derived from the sale of the final units. Plaintiff developed and sold 201 units. The revenues from these units was not sufficient to pay for the improvements and plaintiff has lost in excess of one million dollars on the marina development.

11. The remaining 71 units have a retail value of approximately $1.5 million.

12. The regulatory scheme imposed by the Corps and the Department in 1968 for dredging and dock construction worked as follows. Plaintiff would apply to the Corps for a permit to dredge and construct docks. Upon receipt of the permit from the Corps, plaintiff would apply to the Department of Natural Resources for a contract to remove materials from the bed of the lake. The Department of Natural Resources would routinely enter contracts with plaintiff requiring a nominal cash payment, posting of a bond, and proper disposal of dredging soils. The Department of Natural Resources required no permits of its own. This regulatory scheme as to dredging contracts remained in effect until 1986 when the Department refused to contract with plaintiff for the removal of 15,000 cubic yards of material from the bed of the lake and until 1996 when the Department first imposed a requirement for a structure permit to construct floating docks. Prior to 1996, plaintiff continued to install finger docks on the previously constructed main docks.

13. Plaintiff in good faith applied to the Department for all approvals required by the Department to complete its marina but its applications were denied.

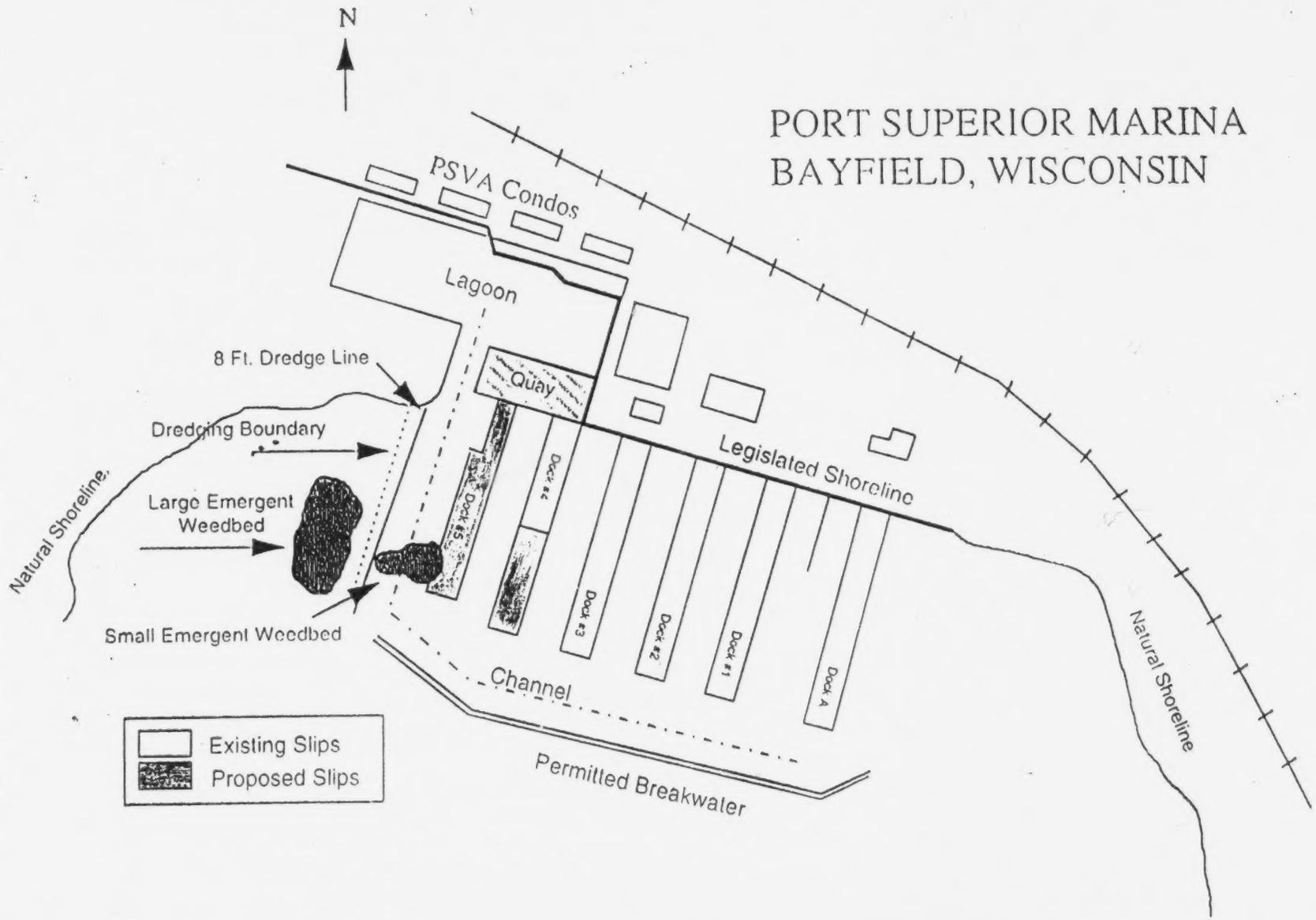
Further affiant sayeth naught save that he gives this affidavit in opposition to defendants' motion for summary judgment.

/s/ Robert F. Holmgren
Robert F. Holmgren

Subscribed and sworn to before me
this 20th day of May, 1999.

/s/ Lee A. Sanford
Notary Public

(SEAL) LEE A. SANFORD
NOTARY PUBLIC • MINNESOTA
My Comm. Expires Jan. 31, 2000



PIKES BAY – LAKE SUPERIOR

ILLUSTRATION

BEST AVAILABLE COPY

Exhibit 70
Exhibit K

Port Superior Marina Association

in Port Superior Village
***Bayfield Wisconsin* 316951**

DECLARATION OF TRUST

IN ACCORDANCE WITH THE UNIT OWNERSHIP

ACT OF WISCONSIN

PORT SUPERIOR MARINA ASSOCIATION

Article 1. Purpose: This Declaration of Trust is executed by the undersigned developers, Robert F. Holmgren and Gertrude I. Holmgren d/b/a R. W. Docks & Slips, a Minnesota partnership, licensed to do business in Wisconsin, fee simple owner of the real estate described hereinafter, for the purpose of forming an association for itself and all future owners pursuant to the UNIT OWNERSHIP ACT, Sections 703.01 to 703.28 of the Wisconsin Statutes.

Article 2. *Name:* The name of the association shall be Port Superior Marina Association.

Article 3. *Duration:* The period of existence of the association shall be perpetual.

Article 4. *Definition:* Unless the context of this Declaration requires otherwise, the definitions of the words used herein, in the By-laws, and in any other documents executed pursuant to this Declaration of trust shall be those set forth in Wisconsin Statutes Section 703.02.

Article 5. *Description of Land:* The property submitted and subjected to the provisions of the Unit Ownership

Act is a Leasehold Interest as described in Volume 307 page 383 & 384 in the Register of Deeds for Bayfield County describing real, personal property and/or easements, said Leasehold Interest is described as follows:

REGISTER'S OFFICE)
) S.S.
Bayfield County, Wis.)

RECORDED AT 4:30 P.M.
ON OCT 3-77 IN
Vol. 307 of Rec
Page 337-429, Incl.

/s/ Otto Korpela
REGISTER OF DEEDS

Fee Due 71.30

Marina Area

That part of Government Lot 3, Section 22, T. 50 N., R. 4W, Bayfield County, Wisconsin, described as follows: Beginning at an iron pipe at the intersection of the North-South 1/4 line of said Section 22 with the water's edge of Lake Superior. Thence N. 00° 21' E., along said 1/4 line 233.24 feet, to a 5/8 inch rebar. Thence S. 76° 04' 43"W., 609.89 feet to a 1" iron pipe. Thence S. 29° 43' 20" E., 221.30 feet to a 1/2" rebar. Thence N. 60° 16' 40" E., 188.66 feet to a 1/2" rebar. Thence S. 29° 43' 20" E., 121.25 feet to a 1/2" rebar. Thence S. 60° 16' 40" W., 325.85 feet (passing thru a 1/2" rebar at 188.66 feet.) Thence S. 29° 43' 20" E., 19.62 feet to a 1" iron pipe on the Bulkhead line of Lake Superior. Thence N. 60° 49' 11" E., 607.18 feet along said Bulkhead line to the point of beginning. Together with an easement for purposes of egress, ingress and regress over

and across a strip of land 30 feet in width on either side of the following described line; Commencing at the Southwest corner of said Section 22; thence east along the South section line a distance of 1,320 feet; thence North 692 feet; thence North 57° East a distance of 90 feet to the point of beginning; thence South 30° East a distance of 420 feet; thence North 72° East a distance of 368 feet more or less. To be included along with this description are all docks, fuel and waterlines, breakwalls and seawalls of Port Superior Marine Association and area between breakwalls and seawalls, in Lake Superior and bulkhead lines as established. Grantors reserve easement on above described premises to use parking facilities and grant same to others. Parcel contains 3.08 acres.

Also:

A second easement for purposes of egress, ingress and regress over and across the following described property: That part of Government Lot 3, Section 22, T. 50 N., R 4W., Bayfield County, Wisconsin, described as follows: To locate point of beginning, commence at the iron pipe marking the intersection of the North-South 1/4 line of said Section 22 with the water's edge of Lake Superior. Thence run S. 87° 48' 20" W., 317.23 feet to a 1/2 inch rebar. Thence S. 60° 16' 40" W., 188.66 feet to a 1/2 inch rebar. Thence N. 29° 43' 20" W., 221.30 feet to a 1 inch iron pipe which is the point of beginning. Thence S. 75° 37' 10" W., 142.25 feet to a 1/2 inch iron pipe. Thence S. 29° 43' 20" E. 40 feet. Thence N. 75° 37' 10" E. 142.25 feet. Thence N. 29° 43' 20" W. 40 feet to the point of beginning.

All as described in the Plat of Survey attached hereto as Exhibit "A" and incorporated herein by reference as a portion of this Declaration of Trust.

Article 6. *Description of Buildings:* All buildings and attachments located on premises.

Article 7. *The Units:* The unit numbers of the units contained in the said Exhibit "A" are as follows: Boat Slips numbered consecutively from 1 through and including 272 and Docks "A"; "1"; "2"; "3"; "4"; and "5."

Each future lessee shall be entitled to the exclusive possession of his unit in accordance with the terms of this Declaration. Each unit, together with its undivided interest in the common areas and facilities, shall for all purposes constitute real property.

The location, approximate area, and immediate common area to which each unit has access is set forth in Exhibits "A" and "B". The legal description of each unit shall consist of its number as aforesaid. Every deed, lease, mortgage, or other document may describe a unit by its identifying number shown on Exhibit "A", and such description shall be good and sufficient for all purposes. No unit owner may sub-divide his unit smaller than that shown on Exhibit "A". Each unit shall consist of the space enclosed and bounded by the interior surfaces of the unit as shown on Exhibit "A", and further designated on Exhibit "B", subject to any encroachment created by settlement or moving of the docks, or permissible repairs or modifications which are deemed valid easements for the benfit [sic] of such unit owners, or the common element; as the case may be, excepting such as may be created by willful conduct.

Article 8. *Description of Common Areas and Facilities:* The common areas and facilities shall consist of all of the property designated on the said Plat of Survey (Exhibit "A") as common areas. Any structures erected or maintained within said common boundary as aforesaid shall be a part of the common areas and facilities.

All easements and rights described herein are appurtenant, running with the land, perpetual, bonding on the undersigned, its successors and assigns, and where designated as common areas and facilities, shall constitute such common areas and facilities pursuant to this Declaration of Trust.

Article 9. *Description of Limited Common Areas and Facilities:* There are no limited common areas as defined in the unit Ownership Act designated as such in this Declaration of Trust, except that when all units are leased the By-laws may designate specific parking areas as limited common area reserved for the use of parking.

Article 10. *Value of Property:* The value of the property as defined in the Unit Ownership Act is $1,496,000.00. The value of each unit and the percentage of undivided interest in the common areas and facilities appertaining to each unit and its owner for all purposes, including voting, shall be an average value of $5500 for each of the units and each unit shall have an equal share of one vote per unit owned.

Each unit owner shall own an undivided interest, in the percentages hereinbefore set forth, in the common areas and facilities as a tenant in common with all other unit owners, and, except as may otherwise be limited in this Declaration, shall have the right to use and occupy

the common areas and facilities for all purposes incident to the use and occupancy of his unit, including the right to vote as hereinafter set forth, and such incidental uses permitted by this Declaration, which right shall be appurtenant to and run with his unit. The above percentages shall be permanent and may not change without consent of all unit owners by amendment to this Declaration.

The building and premises, including all individual units, are to be used solely for recreational purposes in strict conformity with the restrictions and covenants hereto attached.

Article 11. *Rights and Obligations of the Association:* Robert F. Holmgren and Gertrude I. Holmgren d/b/a R. W. Docks & Slips ("The Developer") shall retain fee simple title to the Boat Slip/Units, Common Areas and Facilities (hereinafter referred to as "demised premises") (See Attachment "A") for and during the term hereinafter mentioned. Said "demised premises" is more particularly described in this Declaration and Exhibits, recorded under the Unit Ownership Act, in the office of the Register of Deeds, Bayfield County, Wisconsin, which are made a part hereof by reference.

EXHIBIT A-1